

Delaware Racing Association d/b/a Delaware Park and United Food & Commercial Workers Union, Local 27, AFL-CIO, Petitioner. Case 20-RC-17237

November 8, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

This proceeding presents the issue of whether the National Labor Relations Board should assert jurisdiction over a slot machine enterprise conducted by a racetrack. The Petitioner, United Food and Commercial Workers, Local 27, AFL-CIO,¹ seeks to represent a unit of employees who perform duties exclusively related to the casino aspect of Employer Delaware Park's business. Though the Employer and the Union stipulated to an appropriate unit, a hearing was conducted because the Employer contended that the Board should decline jurisdiction because of the Employer's involvement in the horseracing industry.²

Following the hearing, the Regional Director found that the arrival of gaming machines had led to changes in Delaware Park's work force and revenue stream. These changes had resulted in a business more akin to a casino than to a racetrack. Accordingly, he concluded that the slot machine operation did not "involve" the horseracing industry, and he directed an election. The Employer requested review of the Regional Director's decision and a stay of the election. We granted review, but declined to stay the election. The election was held on May 5, 1997, and the ballots were impounded. We have reviewed the record in the light of the Petitioner's and the Employer's briefs.

The facts here closely parallel those in *Prairie Meadows Racetrack & Casino*,³ our recently issued decision involving another racetrack that received substantial income from slot machines. In each case, the new slot machine operation caused the work force to increase substantially and to change in character from seasonal to year round. In *Prairie Meadows*, we determined that if the employees' job functions in the units sought related predominantly to the casino enterprise and there was no significant functional integration between the casino and horseracing operations, then the casino operation did not involve the horseracing industry. We concluded that this finding was warranted even

though the casino workers were employed by the racetrack. In addition, we concluded that, to the extent that economic factors are relevant, the facts showed that the racetrack was dependent upon the casino, not the other way around. Thus, the casino is not an adjunct of the racing operation.⁴ That analysis governs this proceeding. Accordingly, we affirm the Regional Director's decision.⁵

ORDER

The Regional Director is directed to open and count the ballots cast by the employees in the election, and to take further appropriate action.

CHAIRMAN GOULD, concurring.

When the Board adopted Section 103.3 in 1973,¹ the stated reasons for this rule made no sense² and provide even less support almost a quarter century later. The two primary reasons cited for the rule were (1) the States have extensive control over the horseracing industry and (2) the sporadic nature of employment in the horseracing industry encourages temporary part-time workers, much turnover, and an unstable work force. As shown below, neither reason has merit here.

First, as astutely observed by the Regional Director, state regulation of casinos, jai alai facilities, and other types of gambling establishments has not foreclosed the Board's jurisdiction over those entities.³ Likewise, similar state regulation of the horseracing industry should pose no problem. In this connection, there is no evidence suggesting that the Board's processes would be severely jeopardized if the Board were to start asserting jurisdiction over the horseracing industry.

Second, the Board's earlier fears about asserting jurisdiction over an industry with "a sporadic and unstable workforce" have simply not materialized. The Board has not encountered the serious administrative problems predicted by Section 103.3 when dealing with other industries where employees have chosen various kinds of flexible working arrangements and

⁴ Although the casino operation generates only 62 percent of the Employer's income as compared to 98 percent in *Prairie Meadows*, we conclude that this difference does not alter the view that the casino is not an adjunct of the racing enterprise. In addition, we note that the unit in this case comprises employees engaged exclusively in the casino gaming operation, a factor that further supports our assertion of jurisdiction.

⁵ The relevant portions of the Regional Director's decision are attached.

Inasmuch as the Employer is not covered by Sec. 103.3, we do not reach the issues resolved by our concurring colleague. That is an issue for another proceeding, not this one.

¹ Chairman Miller and Members Jenkins, Kennedy, and Penello; Member Fanning dissenting.

² See Chairman Fanning's point-by-point attack on Sec. 103.3 of the Board's Rules as set forth in his concurring opinion in *Elliot Burch*, 230 NLRB 1161, 1162 (1977).

³ See *El Dorado Club*, 151 NLRB 579 (1965); *The Anthony Co.*, 220 NLRB 886 fn. 5 (1975), enfd. 95 LRRM 3239 (9th Cir. 1977); and *Grand Resorts*, 221 NLRB 539 (1975).

¹ General Teamsters Local Union, No. 326, a/w International Brotherhood of Teamsters, AFL-CIO, intervened on the first day of the trial, solely for the purpose of being placed on the ballot should an election be directed. The Intervenor played no other role in this proceeding.

² Pursuant to Sec. 103.3 of its Rules and Regulations, the Board has declined to assert jurisdiction in proceedings involving the horseracing industry.

³ 324 NLRB No. 91 (Sept. 30, 1997).

schedules. In any event, the record in this case shows that the Employer strives to hire permanent, full-time employees for its year-round casino operations.

In fact, there is substantial evidence that today employment at many, if not most, racetracks is not “sporadic or unstable.” Many tracks schedule races 5 or 6 days a week year round or with short breaks between meets. For example, the racing schedule published in *The Blood-Horse*, October 11, 1997, page 5515, indicates that the following tracks operate January 1 through December 31: El Comandante, Mountaineer Park, Penn National, and Philadelphia Park. Some tracks schedule racing throughout the year with brief breaks between meets, while others remain open throughout the year except for winter breaks. It seems quite likely that these employers are hiring a large proportion of their work force on a year-round basis.

Horseracing is no longer, if it ever was, a local business. Many tracks are owned and operated by multinational corporations operating racetracks, simulcasting, casinos, and hotels nationwide in the United States and in other countries as well.⁴ At a recent 18-day meet, Fairplex Park’s intrastate wagering amounted to \$46,715,775. It also engaged in out-of-state simulcasting.⁵ A minimum of research would produce, I am sure, many other examples of the huge economic impact of the horseracing industry. There can be no question but that a labor dispute in this industry will have a substantial impact on commerce.

In sum, the horseracing industry is an industry with a major impact on commerce. Until Section 103.3 of the Board’s Rules is revoked the many employees working in this industry will continue to be denied the protection of the National Labor Relations Act. I urge the immediate revocation of this rule.

⁴For example, Ladbroke Group PLC, a British company, owns the Detroit Race Course. Another example is Patriot American Hospitality which “obtained a favorable tax structure when it purchased Bay Meadows Operating Company and the California Jockey Club last year” and “increased its holdings with the acquisition of a hotel chain and a casino resort in Puerto Rico.” See *The Blood-Horse*, October 11, 1997, p. 5396.

⁵See *The Blood-Horse*, October 11, 1997, p. 5396.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (the Act), as amended, a hearing¹ was held before a hearing officer of the National Labor Relations Board (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding, the undersigned finds:

¹The parties stipulated at the hearing that the correct name of the Employer is Delaware Racing Association.

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that United Food and Commercial Workers Union, Local 27, AFL–CIO (the Petitioner) and General Teamsters Local Union No. 326, a/w International Brotherhood of Teamsters, AFL–CIO (the Intervenor),² are each labor organizations within the meaning of the Act.

3. The parties stipulated that the Employer is a Delaware corporation engaged in operating and maintaining a business operation known as Delaware Park. The parties further stipulated that during the calendar year ending December 31, 1996, the Employer derived gross revenues in excess of \$500,000 from those business operations and purchased and received goods and materials and services valued in excess of \$50,000 from points located outside the State of Delaware. Based on the parties’ stipulations to such facts and for the reasons discussed below, I have concluded that the Employer is engaged in commerce and that it will effectuate the purposes of the Act to assert jurisdiction herein.

Delaware Park opened in about the mid-1930s and, with the exception of a couple of years in the early 1980s, it has operated continuously as a thoroughbred horseracing track. In the early 1980s, Delaware Park was purchased by William Rickman, Sr., who currently is the controlling stockholder and chairman of the board of the Employer. The parties agree that by at least the early 1990s, Delaware Park and other horse racetracks in the State of Delaware faced financial hardship because they had difficulty competing with racetracks in other States that could offer larger purses and could attract better quality horses. In 1994, in response to the depressed state of the horseracing industry in Delaware, the Delaware General Assembly adopted the Horse Racing Redevelopment Act³ which authorized a video lottery in the State of Delaware. The video lottery machines are similar to slot machines found in casinos in Atlantic City or Las Vegas, but under the Delaware law, they are restricted to “the confines of an existing racetrack property . . . on which was conducted in 1993 either a horse racing meet . . . or a harness horse racing meet.”⁴

In the last few days of December 1995, the Employer began operating video lottery terminals (VLTs) at Delaware Park. The VLT operation and the limitations placed on the operation by the State of Delaware are discussed in more detail below. In sum, however, the Employer’s introduction of the VLTs was very successful and accounted for approximately \$56.8 million in revenue in 1996.⁵ The Petitioner

²The Intervenor did not participate in the hearing but moved to intervene only for the purpose of being included on the ballot in whatever unit the Regional Director determines is appropriate and directs an election. The Employer had no objection to the motion to intervene so long as the Intervenor sought representation of the same unit of employees sought by the Petitioner. The Petitioner did not object to the motion to intervene, but did reserve its right to file appropriate internal dispute adjustment procedures within the AFL–CIO. The hearing officer granted the motion to intervene.

³The Horse Racing Redevelopment Act amended various sections of Chapter 48, Title 29, and certain Chapters of Titles 3 and 28, of the Delaware Code.

⁴29 Del. C. § 4819(a).

⁵During the same time period, the Employer accumulated approximately \$25.8 million in parimutuel revenue and approximately \$8.9

Continued

filed the instant petition to represent the employees employed in the Employer's VLT operation.⁶

The Employer contends that the petition in the instant matter should be dismissed because, pursuant to Section 103.3 of the Board's Rules and Regulations, "the Board will not assert its jurisdiction in any proceeding under Sections 8, 9, and 10 of the Act involving the horseracing [sic] and dogracing [sic] industries." 29 C.F.R. § 103.3. In support of its position, the Employer points to Board precedent and to the Advice Memorandum issued by the Office of the Board's General Counsel in *The Downs at Lehigh Valley*, Case 4-CA-22934 (Nov. 22, 1994), wherein the Board's General Counsel refused to issue a complaint against an employer operating an off-track betting parlor and restaurant on the basis that "the employer is an integral part of the horseracing [sic] industry over which the Board, under NLRB Rules and Regulations Section 103.3, will not assert its jurisdiction."⁷ The Employer strongly argues that its VLT operation is an integral part of its horseracing operations and that the Board therefore will not assert jurisdiction.

The Petitioner, on the other hand, argues that the Employer's VLT employees do the same work as casino employees and that the Board has asserted jurisdiction over employers operating casinos. Moreover, the Petitioner asserts that because the Employer's VLT operations account for such a significant portion of its revenues, the essential business of the Employer has changed and that it is now "a gaming casino that incidentally also operates a horse book." For these reasons, the Petitioner strongly urges that I find and assert jurisdiction over the Employer because Section 103.3 of the Rules and Regulations are inapplicable in the instant case.

For the following reasons, I find that the Board does have jurisdiction over the Employer and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

million in revenue from other sources (such as food and beverage services).

⁶The parties stipulated that the following would be an appropriate unit of employees if I were to direct an election:

All full time and regular part time video lottery operations and/or slot machine employees employed by Delaware Racing Association at its campus in Wilmington, Delaware, including lead technicians, slot technicians, floor attendants, dispatch clerks, booth supervisors, cage and coin cashiers, booth cashiers, change attendants, impress clerks, satellite cashiers, wrappers, main bank cashiers, hard count clerks, soft count clerks, and excluding all other employees which include shift supervisors, area supervisors, vice presidents, key employees, directors and managers of Delaware Park, the executive director, executive director of slots or VLT, director of slots or VLT, technical managers, shift managers, property controllers, assistant property controllers, income audit managers, income audit clerks, slot cashiering managers, cashier shift managers, assistant slot cashiering managers, assistant cashier shift managers, hard count supervisors, assistant hard count supervisors, soft count supervisors, assistant soft count supervisors, all track money room employees, all food and beverage employees, all food and beverage revenue and accounting employees, all office clerical employees, all parimutuel clerks, all parimutuel supervisors, all stewards, valets, grooms, starting gate and other live racing personnel, all simulcast racing employees, all security and surveillance employees, all other employees, guards, and supervisors as defined in the Act.

⁷Br. at p. 15 citing the Advice Memorandum in *The Downs at Lehigh Valley*, 4-CA-22934 (Nov. 22, 1994), 1994 GCM LEXIS 65.

The Facts

State Regulation

A VLT is a machine in which bills, coins or tokens are deposited in order to play a game of chance in which the results are randomly and immediately determined by the machine. The machine may use spinning reels or video displays or both, and may dispense coins or tokens directly to winning payers.⁸ In Delaware, the only entities that may be licensed as "video lottery agents" are persons or corporations which, in 1993, held either a licensed horseracing meet or a licensed harness horseracing meet.⁹ Delaware Park is the only entity that qualifies as a video lottery agent in New Castle County, Delaware. Two other horse racetracks in Delaware qualify because they conducted a harness meet in 1993. By law, no more than 1000 VLTs may be located within the confines of a particular racetrack property. The number and type of machines are subject to review by the Director of the State Lottery Office.¹⁰ All VLTs are either owned by the State or are leased by the State from a licensed manufacturer; the horse racetrack cannot own or lease the VLTs.¹¹

All the VLTs are required to be connected to the State Lottery's central computer system and the State Lottery has the ability to turn the VLTs on and off. By law, the VLTs can be operated 363 days a year, Monday through Saturday from 8 to 2 a.m., and on Sunday from 1 p.m. to 2 a.m.¹² Using a central computer system, the State Lottery turns on the VLTs located at the Employer's facility at 8 a.m. Monday through Saturday and at 1 p.m. on Sunday and the State Lottery turns them off everyday at 2 a.m.

In order to maintain a license as a video lottery agent, the Employer must (1) conduct live horseracing operations on at least 100 days per year and (2) employ during the live horseracing operations a minimum of one hundred additional employees than the average daily number employed during the 1993 racing meet.¹³ By law, on an average basis, at least 87 percent of the total proceeds received from the VLT operation must be returned to the players of the machines.¹⁴ All proceeds, net of proceeds returned to players, are transferred into the State Lottery Fund. The State Lottery retains up to 30 percent of the amount remaining after all payments to players. The money kept by the State goes first to cover ad-

⁸ 29 Del. C. § 4801(g). The Employer's chief operating officer testified that the appearance of the machines and the gambling experience using the VLTs is the same as at casinos in Atlantic City. There is a VLT version of Keno and VLTs that have card games including blackjack and royal flush poker. The VLTs at the Employer's facility can be played for 25 cents, 50 cents, \$1, \$2, or \$5. A patron wins based on probability; the probability is set on a computer chip that operates the VLT. If a person wins, the machine (or, if necessary, an attendant) pays the person or gives them credits on the machine.

⁹ 29 Del. C. § 4805(b)(13).

¹⁰ 29 Del. C. § 4820(b).

¹¹ 29 Del. C. § 4820(a). The employees who are the subject of the instant representation petition are clearly employees of Delaware Park and are not employees of the State of Delaware. Indeed, no party has contended otherwise.

¹² 29 Del. C. § 4819(c). The VLTs may not be operated on Christmas Day or on Easter.

¹³ 29 Del. C. § 10148(1).

¹⁴ 29 Del. C. § 4815(b)(1).

ministrative costs of the video lottery and to fund a program for the treatment of compulsive gamblers; the remainder of the 30 percent is paid into the State's General Fund. Of the proceeds then remaining, the State deducts an amount necessary to reimburse it for the costs of the VLTs, related equipment, and the central computer system. The State then pays the video lottery agent (i.e., the Employer) 10 percent of whatever funds remain to be used by the agent only for purses for horse races. Finally, any remaining funds are paid to the video lottery agent as a commission.¹⁵

The Employer's Operations

The Employer's facility consists of a five-story main building that is attached to a grandstand which the Employer's chief operating officer estimated seats 5000 to 10,000 people. The grandstand looks out over an oval horse race-track. The facility also has an administration building adjacent to the paddock, an office building that is attached to the main building, and other buildings for housing horses, etc. From the testimony of the Employer's chief operating officer, it appears that the first floor of the main building contains some lockers, wash areas, and a receiving area; in addition, there is a walkway to elevators and escalators. On the second floor, there are offices, some parimutuel windows, simulcasting areas, concession stands, the Legends Restaurant, a deli, some bars, and all of the VLT machines. A floor plan showing that portion of the second floor containing the VLT machines was submitted into the record. The floor plan shows that the VLTs are grouped in rows or in a circle and that they are grouped by the amounts of the wager.¹⁶ In other words, the VLTs are arranged in a similar style to many casinos. A ramp from the VLT area leads to another section of this floor that contains additional parimutuel and simulcasting betting. The next floor has another area of parimutuel and simulcasting betting and a sports bar. The fourth floor has a banquet type room where an individual can watch simulcast and live racing, an area for parimutuel betting, and a traditional clubhouse restaurant. The fifth floor of the main building is closed off to the public. The second through the fourth floors have entrances to the grandstand.

The Employer began its VLT operations in the last few days of 1995. At the time of the hearing, Delaware Park operated 1000 VLTs at its facility. In 1996, the VLTs were available to customers 363 days a year, from 8 a.m. to 2 a.m. (except on Sunday when the VLTs do not open until 1 p.m.). As described above, all of the VLTs are located on the same floor of the Employer's facility. In 1996, an estimated \$1.4 billion was wagered in the VLT operations and the Employer received an estimated \$56 million in gross revenue from the VLT operations.

In 1996, the Employer conducted live horseraces on 139 days. The races were conducted between the hours of 12:30 p.m. and 5:30 p.m. The purses offered by the Employer in 1996 were double the size of the purses offered in 1995 because of the moneys added to the purses from the VLT operations. The Employer plans to have approximately the same number of live racing dates in 1997 that they had in 1996.

In 1995, approximately \$179 million was wagered through parimutuel betting (live and simulcast), while in 1996, an estimated \$233 million was wagered. The Employer's parimutuel revenues increased from approximately \$22 million in 1995 to an estimated \$25 million in 1996.

In 1996, approximately 62 percent of the Employer's gross revenues came from the VLT operations. The record also shows that the Employer's gross revenues from all sources increased from approximately \$27 million in 1995 to \$91 million in 1996.

The Employer has distinct operating departments including a separate VLT operations department that is headed by an executive director of slots. The executive director of slots is responsible for all phases of the slot operations and has ultimate responsibility for the efficiency and profitability of the VLT operations. His responsibilities include supervision, training, and evaluation of all slot personnel. Some of the Employer's other departments have responsibilities connected with the VLT operations. For example, the security and surveillance department handles security and surveillance for both the VLT operations as well as the parimutuel and racing operations; the food and beverage departments serve both VLT customers and racing/parimutuel customers; the finance and racing department handles the financial transactions for both the VLT operations and the racing and parimutuel operations; and the maintenance department has duties covering the Employer's entire facility (VLTs, racing, and parimutuel areas).

The Employer has one human resources department that covers employees in all departments. The Employer has one centralized payroll for all employees. All employees are subject to the same general employment policies. All employees are eligible for the same medical benefits program and the same worker's compensation program. Upon being hired, all employees (including the VLT employees) are required to fill out an application with the Delaware Thoroughbred Racing Commission. The Racing Commission collects employees' fingerprints and conducts an investigation. Occasionally, the Racing Commission has told the Employer that an investigation revealed that an employee had been arrested or convicted for an offense in the past or that they had falsified their application in some way. The Employer then conducts its own investigation and either resolves the matter by correcting the Racing Commission's information or by terminating the employee. Neither the Racing Commission nor the State Lottery Office issues licenses to employees who would be included in a bargaining unit.

The Employer jointly advertises its parimutuel wagering and its VLT wagering. For example, four billboards along interstate highways in Delaware reference or depict both the Employer's slots and horseracing operations. The record shows that the Employer's patrons come from the following areas: approximately 45 percent from Delaware; 25 to 30 percent from Pennsylvania; 12 to 15 percent from Maryland; and 7 percent from New Jersey.

The Employer's VLT operations are year round—they are not seasonal in any manner and no VLT employee has been laid off from work. The record shows that the Employer aims to hire permanent, full-time employees for its VLT operation. The VLT employees typically work four 10-hour days per week. When the VLTs were first installed, some racing employees may have taken VLT positions, however,

¹⁵ 29 Del. C. § 4815.

¹⁶ For example, there may be a row of seven 25-cent VLTs set up back to back with seven additional 25-cent machines.

there is no record evidence of interchange between the VLT employees and the racing employees. Finally, the VLT employees have a separate supervisory hierarchy that culminates with the executive director of slots.

Legal Analysis

Under Section 103.3 of the Board's Rules and Regulations, "[t]he Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing [sic] and dogracing [sic] industries." In the statement accompanying the rule, the Board stated as follows:

In prior decisions, the Board declined to assert jurisdiction over these industries noting, inter alia, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; the State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through state racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the "integrity" of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States continuing interest in and supervision over the industries.

In addition, the sporadic nature of the employment in these industries encourages a high percentage of temporary part-time workers and results in a high turnover of employees and a relatively unstable work force. This is further evidenced by a pattern of short work hours and sporadic and short periods of active employment by any given employer.

Besides minimizing the impact on commerce of the industries, this pattern of short-term employment also gives us pause with respect to the effectiveness of any proposed exercise of our jurisdiction in view of the serious administrative problems which would be posed both by attempts to conduct elections and to make effective any remedies for alleged violations of the Act within the highly compressed time span of active employment which is characteristic of the industries.

Thus, we have concluded that the operations of these industries continue to be peculiarly related to, and regulated by, local governments and, further that our exercise of jurisdiction would not substantially contribute to stability in labor relations.

In the instant case I find that (1) the Employer's VLT operations are not regulated to such an extent by the State of Delaware so as to preclude Board jurisdiction; (2) the stable, year-round work force in this case would allow for effective application of the Act and the Act's remedies; and (3) the Employer's VLT operations are not local but, rather, are clearly conducted in interstate commerce.

First, as to regulation by the State of Delaware, I note that the Board has consistently asserted jurisdiction over casinos and other types of gambling establishments despite the fact that those entities were also regulated by the State. See *El*

Dorado Club, 151 NLRB 579 (1965) [Board asserted jurisdiction over a casino]; *Grand Resorts*, 221 NLRB 539 (1975) [Board asserted jurisdiction over a jai alai facility]; *The Anthony Co.*, 220 NLRB 886 fn. 5 (1975), enf'd. 95 LRRM 3239 (9th Cir. 1977) [Board asserted jurisdiction over a poker club]. In addition, in this case I note that while the State of Delaware regulates the VLT operations, the State does not regulate the Employer's labor relations. Thus, the Employer is free to hire, fire, discipline and evaluate employees, set wages, schedule employees' work hours and week, decide on benefits, make work assignments, and set job descriptions. The only role that the State plays in regard to the Employer's employees is that each employee must submit an application, fingerprints and an application fee to the State; the State does not license employees.¹⁷

Next, it is clear from the record that the Employer's VLT work force is very stable. I therefore find that the Board's concerns about the effectiveness of exercising jurisdiction in this case because of the alleged temporary, sporadic nature of employment in the racing industry, resulting in a high turnover rate and an unstable work force, is not a concern at all in this case.

Finally, it is also clear from the record that the Employer's VLT operations are interstate in nature. Thus, the Employer advertises its VLTs (as well as horseracing) on interstate highways. According to the record, the Employer competes with Atlantic City, approximately 75 miles away, for its customers. Moreover, the makeup of the Employer's VLT patrons show that approximately 60 percent of the patrons come from States other than the State of Delaware. Based on these facts, there can be no question that the Employer is engaged in interstate commerce and that the Employer's VLT operations are anything but local in nature.

The State's regulation of the Employer's VLT operation does not remove the Employer from the Board's jurisdiction. Because the Employer employs permanent full-time employees in the VLT operation which constitutes a stable, year-round work force, and because the Employer's VLT operation is clearly interstate in nature, I conclude that Section 103.3 of the Board's Rules and Regulations does not prohibit assertion of the Board's jurisdiction in this case.

In so concluding, I am fully aware of Board decisions that have described the test for determining if an entity is involved in the horseracing industry as being whether the employer's operations are "integrally related" to horseracing. *Waterford Park*, 251 NLRB 874 (1980), aff'd. 109 LRRM 2289 (D.C. Cir. 1981) [Board asserted jurisdiction over a motel located on the same grounds as a horse racetrack and owned by the same company that owned the racetrack because the motel was not integrally related to the horse track]; *Ogden Food Service*, 234 NLRB 303 (1978) [Board asserted

¹⁷In determining whether it has jurisdiction, the Board considers only whether the employer meets the definition of "employer" under Sec. 2(2) of the Act and whether such employer meets the applicable monetary jurisdictional standards. *Management Training Corp.*, 317 NLRB 1355 (1995). In determining the question of jurisdiction, the Board no longer assesses the quality and/or quantity of factors available for negotiation by a private employer that contracts with a government entity. *Id.* I have noted the degree of State regulation in this case because it was one of the factors considered by the Board in implementing Sec. 103.3 of the Board's Rules and Regulations.

jurisdiction over employer who provided food and beverage services at a horse racetrack owned by another company]. The Employer argues in this case that its VLT operations are integrally related to its horseracing operations because one would not survive without the other. The Employer's argument is based on (1) the fact that its horseracing operation would not survive financially without the support of funds from the VLT operation and (2) the fact that the VLT operation cannot exist without horseracing because, under Delaware law, VLTs can only be located within the confines of a horse racetrack.

The Employer's first basis for its argument must be rejected because the Board's use of the phrase "integrated" traditionally refers to a degree of functional integration rather than strictly financial integration. In this case, the Employer's VLT and horseracing operations are not functionally integrated. While the two operations make use of some of the same administrative departments, the operations do not rely on each other at all to function. In other words, the horseraces can take place whether or not the VLTs are operating and the VLTs can be operated whether or not there is a horserace going on. I do not find persuasive the Employer's argument that its VLT and horseracing operations are integrated merely because some of the money from the VLT operations is used to increase the purses of horseraces. If the mere financial relationship of the two operations was sufficient to make one functionally integrated with the other, then hypothetically any employer could add a horse racetrack to its facility to evade Board jurisdiction.¹⁸

Nor are the facts of this case similar to those of the employer operating the off-track betting business in *The Downs at Lehigh Valley*, supra. In that case, unlike the instant case, all of the employer's employees were required to be licensed by the Pennsylvania Harness Racing Commission, the off-track betting operation involved wagering on horses and the money wagered by the customers of the off-track betting site was included in a common parimutuel pool with money from other primary and nonprimary locations of the employer's horseracing operations.

The Employer's second basis for its "functionally integrated" argument is that, under Delaware law, the Employer

could not have the VLT operation if the Employer was not a horseracing track. This argument is also insufficient to establish functional integration of the VLT and the horseracing operations. The statutory basis which permits the Employer to operate slot machines does not create a relationship between the operations of the slot machines and the horseraces. The Board has specifically held that casinos and the employers who operate businesses based on slot machines are subject to the Board's jurisdiction. The fact that slot machines in Delaware are limited to the premises of horse racetracks does not imbue the slot machine business with any of the traits that gave rise to the Board's decision to eschew jurisdiction over horseracing.

The facts in the instant case are novel and are not squarely governed by any of the Board's previous cases involving interpretation of Section 103.3 of the Board's Rules and Regulations.¹⁹ In this case, the Employer's VLT or slot operation has become its main source of revenue and its main business. To argue otherwise would be to ignore the realities of this case. The Employer collected gross revenue of \$56.8 million from the VLT operation in 1996 compared to \$25.8 million in gross revenue from all parimutuel betting (live and simulcast). Total gross revenue in 1995 (when the VLTs were only operational for a few days) was approximately \$27.4 million, while total gross revenue in 1996 (with a full year of the VLTs) the Employer's total gross revenue was estimated to be \$91.5 million. The VLT operation has transformed the Employer's business other than just in terms of revenues. The Employer now does business all year long, while prior to installation of the VLTs, there was a seasonality to the business. The Employer now employs a larger work force and the work force is made up of permanent, full-time workers. Through the addition of the VLT operation, the Employer has become more akin to a casino with an occasional horserace conducted on the premises.

CONCLUSION

For all of these reasons, I find that the Employer's VLT operations do not involve the horseracing industry and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

¹⁸ Contrary to the Employer's assertion, the Board will not decline to assert jurisdiction over an employer merely because one aspect of that employer's business operation is not subject to Board jurisdiction. For instance, although the Board does not have jurisdiction over religious institutions, the Board does assert jurisdiction over certain business operations of religious institutions. See *The Salvation Army of Massachusetts*, 271 NLRB 195 (1984), enf'd. 119 LRRM 2587 (1st Cir. 1985); *Denver Post of the National Society of Volunteers of America v. NLRB*, 723 F.2d 302 (3d Cir. 1982), *Tressler Lutheran Home for Children*, 677 F.2d 302 (3d Cir. 1982).

¹⁹ Administrative notice is taken of *Prairie Meadows Racetrack & Casino*, Cases 18-RC-15972, 18-RC-15997, and 18-RC-15998. In these cases, a Regional Director found that it would not effectuate the purposes of the Act to assert jurisdiction over an employer who, like the Employer in the instant case, operated both a horse racetrack and a casino on the basis that the employer was involved in the horseracing industry. Each of these cases is currently pending before the Board pursuant to Board Orders dated November 22, 1996, granting the petitioner's request for review.